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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-648

RAMON D'EUGENIO,
Petitioner,

against

SLATTERY CONSTRUCTION CO., INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Preliminary Statement

Although the printed petition docketed herein states that a writ of certiorari is sought to the Court of Appeals of the State of New York, by affidavit verified November 12, 1971 counsel for petitioner has requested this Court to consider the petition amended to seek certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Counsel for petitioner concedes that the petition, as docketed, is "incorrectly addressed to the Court of Appeals of the State of New York."

Jurisdiction

There is no jurisdiction whatever for entertainment of the petition. Not only is there no substantial federal question involved, there is *no* federal question involved. Moreover, Title 28, U.S.C. § 1257 subd. (3), under which jurisdiction is alleged in the petition to exist, precludes review of a decision of the Appellate Division, which is not the highest court of the State of New York.

Question Presented

The petition asserts that a proper interpretation of Section 241 of the Labor Law of New York is here involved. The petition states that the trial court's interpretation of Section 241 is repugnant to the Constitution, treaties and laws of the United States. However, nowhere in the petition is there any citation to the Constitution or to any treaty or federal law which the trial court's decision violated.

Statement

The statement presented in the petition as to the facts of this matter is entirely erroneous. There was no proof presented to the trial court with respect to the length of time in which the excavating operation had continued and no proof whatever that there was any period in which there had been any "disregard to the safety of the workmen." The true facts are as stated in the opinion of Mr. Justice Leibowitz, annexed to the petition as pages 8 to 10.

I

No Jurisdiction Exists for Entertainment of the Petition

A. No Federal Question Involved

While the petition asserts that the trial court's determination is repugnant to federal law, there is no mention whatever of the federal law to which the decision is allegedly repugnant. In fact, there has been no federal question involved in this case from its inception and the attempt, now, to assert the existence of such federal question is misguided. The petition clearly reveals that no federal question exists here.

Jurisdiction is alleged to exist under Title 28, U.S.C. § 1257 subd. (3) but the petition clearly fails to show the existence of jurisdiction under that statute. Rule 19 of the Rules of this Court similarly requires that a petition for a writ of certiorari show that there is involved a "federal question of substance." See also, Rules 23 subd. 1 (d), (f) and 40(c). Here, not only does the petition fail to show the existence of a substantial federal question, it completely fails to show the existence of *any* federal question.

The petition cannot be entertained. As was stated by this Court in *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945):

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock* v. *Memphis,* 20 Wall. 590, 636; *Berea College* v. *Kentucky,* 211 U.S. 45, 53; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 232 U.S. 157, 164; *Fox Film Corp.* v. *Muller,* 296 U.S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and

federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

B. No Determination of the Highest State Court Involved

Title 28, U.S.C. § 1257 provides for review by this Court by writ of certiorari only of "final judgments or decrees rendered by the highest court of the State in which a decision could be had." Here, unquestionably, the determination for which review is sought is not that of the highest court of the State of New York.

The printed petition states that a writ of certiorari is sought to the Court of Appeals of the State of New York. Actually, as the printed petition discloses, there has been no determination in this matter by the Court of Appeals of the State of New York. That court merely denied the motion by this petitioner for leave to appeal to that court.

Petitioner recognizes this deficiency and has, by typewritten amendment, sought to have the printed petition corrected so as to direct the writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, an intermediate appellate court.

Under the circumstances, it is evident that there is no ground whatever here for the issuance of a writ by this Court.

II

No Merit Exists to the Petition.

The opinion of the trial court, printed in the petition, sets out the pertinent facts and makes the conclusion that, under the law of the State of New York, no liability existed

on the part of this respondent to this petitioner on the facts of this case. The determination was entirely correct.

Under New York law it is clear that Section 241 of the Labor Law does not impose absolute liability on a general contractor, such as this respondent, for a violation of the Section by a sub-contractor, as allegedly occurred in this case. *Curtis* v. *State of New York,* 23 N.Y. 2d 976 (1969); *Corbett* v. *Brown,* 32 App. Div. 2d 27 (3d Dept. 1969); *Lipka* v. *United States,* 369 F.2d 288 (CA 2d 1966) cert. den. 387 U.S. 935 (1966).

The proof in this case clearly showed that there was no violation of the New York Labor Law by the sub-contractor —even though the trial court found the sub-contractor negligent—and, further, that the sub-contractor's work was neither dangerous nor unsafe. Under the New York decisions construing Section 241, this respondent was not responsible for supervising the details of the sub-contractor's work. *Curtis* v. *State of New York, supra; Lipka* v. *United States, supra* (citing the *Curtis* case); *Zuchelli* v. *City Construction Co.,* 4 N.Y. 2d 52 (1958); *Wright* v. *Belt Associates,* 14 N.Y. 2d 129 (1964); *Cangiano* v. *LoBosco,* 23 App. Div. 2d 860 (2d Dept. 1965) aff'd 18 N.Y. 2d 922 (1966). Under New York law, respondent had no duty to inspect the sub-contractor's method of doing the work (*Olsommer* v. *George W. Walker & Sons, Inc.,* 4 App. Div. 2d 424 [4th Dept. 1957] aff'd 4 N.Y. 2d 793 [1958]) since respondent had no control over the subcontractor's work. *Gambella* v. *John A. Johnson & Sons,* 285 App. Div. 580 (2d Dept. 1955).

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, has unanimously affirmed, without opinion, the determination of the trial court. The highest court of the State of New York, the Court of Appeals, has refused to grant leave to appeal to that court to this petitioner. Obviously, the

judicial tribunals of the State of New York have been in unanimous agreement that there is no basis whatever for this petitioner's suit against this respondent.

Even if this Court could entertain the petition, the petition should be denied.

Conclusion

Since no jurisdiction to entertain this petition has been shown, the petition should be dismissed. Even if this Court could entertain the petition, the petition should be denied.

Respectfully submitted,

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